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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 661

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI.

Petitioner's Brief and Argument.

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ON WRIT OF CERTIORARI.

Petitioner's Brief and Argument.

To the Honorable Supreme Court of the United States

This cause is now before this Honorable Court on a writ of *certiorari* granted March 4, 1935 to review the judgment of the Appellate Court of Illinois, First District, reversing the judgment of the Circuit Court of Illinois entered in favor of the petitioner and against the respondent.

I.

Opinion of the Court Below.

The opinion of the Appellate Court of Illinois, First District, is reported in 275 Ill. App. 530 (see also Transcript of Record, p. 31).

II.

Jurisdiction of this Court.

The question of this Court's jurisdiction to review the decision of the Appellate Court of Illinois, First District, was presented and argued by both parties on petition for writ of *certiorari*. This Court decided in favor of its jurisdiction and granted the writ. The case is now before the Court for review on the merits and we, therefore, feel that the jurisdictional question is closed and no further argument need be made on that behalf. We, however, will restate the grounds of this Court's jurisdiction so that we strictly comply with the Court's rules.

The petitioner respectfully represents to this Honorable Court that this case involves a Federal question, namely, the rights, privileges, immunities and the extent of liability, if any, of a national banking association organized and existing under the laws of the United States.

First National Bank, etc., v. *Alexander Anderson*, 172 U. S. 573.

Leander J. McCormick v. *Market National Bank of Chicago*, 165 U. S. 538.

Logan County National Bank v. *Townsend*, 139 U. S. 67, pp. 72, 73.

It follows from the fact that this case involves a Federal question and from the further fact that the decision of the Appellate Court of Illinois, First District, is from the highest court of the State of Illinois in which a decision in this case can be obtained, that this Court has jurisdiction to review the decision of said Appellate Court of Illinois.

Chicago & Eastern Illinois R. R. Co. v. *Industrial Commission of Illinois*, 284 U. S. 296, 297.

Chesapeake & Ohio R. R. Co. v. *Mihas*, 280 U. S. 102, 104.

Minneapolis, St. P. & S. S. Ry. Co. v. *Rock*, 279 U. S. 410.

American Railway Express Co. v. *Levee*, 263 U. S. 19.

III.

Statement of the Case.

This cause came before the Appellate Court of Illinois on the pleadings, and in the interest of brevity we will summarize the pertinent facts appearing therein.

The action is in assumpsit and the declaration contains a count in special assumpsit upon a written contract. The following is alleged in substance: The payment by the petitioner of Thirty Five Thousand Dollars ($35,000) in consideration of the delivery by the respondent to the petitioner of thirty-five (35) One Thousand Dollar ($1,000) par value First National Company real estate bonds and a written agreement by the respondent to repurchase the same at maturity, paying therefor the par value of said bonds and accrued interest thereon, and further alleging the breach of said contract by the respondent. (Rec. p. 1)

The declaration also contained the common counts in general assumpsit. (Rec. p. 1)

The petitioner filed with his said declaration an affidavit of claim, pursuant to the Illinois Practice Act of 1907 (Cahill's Illinois Rev. St., 1931, chap. 110, paragraph 55). (See Appendix.) The affidavit stated, in substance, that the nature of his demand was upon said written contract to repurchase said bonds from him, as aforesaid. (Rec. p. 4)

To said declaration the respondent filed two pleas: (1) The general issue, and (2) a special plea alleging that said written contract was *ultra vires* the respondent under the National Bank Act. (Rec. p. 6)

With each of said pleas, the respondent filed two affidavits of defense, the one filed to the special plea alleging, in substance, that the respondent was a National Bank organized under the National Banking laws and that it had no authority, under said banking laws, to make this agreement. (Rec. p. 6)

The Circuit Court of Cook County, upon a directed verdict, entered a judgment in favor of said respondent, from which judgment the petitioner appealed to the Appellate Court of Illinois, First District. Said Appellate Court reversed said judgment and remanded said cause to the trial court. (Rec. p. 7) The decision of the Appellate Court of Illinois on said appeal is reported in 265 Ill. App. 238.

After said cause was redocketed in the Circuit Court of Cook County, that Court, on April 15, 1932, struck the respondent's affidavit of meritorious defense filed with its special plea, on the ground of its insufficiency in law, and entered a judgment, as upon default, in favor of the petitioner and against the respondent for the sum of Thirty Nine Thousand, Eight Hundred Forty One Dollars and Sixty Six Cents ($39,841.66), together with the petitioner's cost of suit. (Rec. p. 7) (Cahill's Illinois Rev. St., 1931, chap. 110, par. 55). (See Appendix.)

On December 28, 1933, the respondent sued out a writ of error in the Appellate Court of Illinois, First District, to review the said judgment of the Circuit Court of Cook County, and, thereafter, on, to wit, June 15, 1934, the said Appellate Court of Illinois, First District, reversed the said judgment of said Circuit Court of Cook County and, without remanding said cause to the trial court, entered its own judgment against the petitioner. (Rec. p. 25)

On June 26, 1934, the said Appellate Court of Illinois denied the motion of the petitioner for a certificate of importance and an appeal to the Supreme Court of Illinois.

On October 23, 1934, the Supreme Court of Illinois denied to the petitioner leave to appeal to the said Supreme Court of Illinois from the judgment of the Appellate Court of Illinois, First District (Rec. p. 53), and by virtue of subsection (2), Section 75, Article VIII of the Illinois Civil Practice Act (Cahill's Illinois Rev. St., 1933, chap. 110, par. 203) (See Appendix), the said judgment of the Appellate Court of Illinois became final.

IV.

Specifications of Error.

The errors on account of which the judgment of the Appellate Court of Illinois, First District, should be reversed are as follows, to wit:

1. The Appellate Court of Illinois erred in finding and holding that the respondent had no power or authority under the National Bank Act, as then in force (44 Stat. 1226), to make and enter into the repurchase agreement sued upon and set forth in the petitioner's declaration, and in finding and holding that by reason thereof said contract was *ultra vires* and void, and that no recovery could be had thereon.

2. The Appellate Court of Illinois erred in not finding and holding that the respondent had the power and authority under the National Bank Act as then in force (44 Stat. 1226) to make and enter into the repurchase agreement sued upon and set forth in the petitioner's declaration, and in not finding and holding that said contract was within the corporate power of said respondent, and that the petitioner could recover thereon.

3. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in finding and holding that the petitioner was not entitled to recover from the respondent on an implied assumpsit, the moneys paid by him to said respondent in reliance upon said void contract and agreement.

4. The Appellate Court of Illinois erred, after finding and holding that the repurchase contract and agreement was *ultra vires* and void under the National Bank Act, in not finding and holding that the petitioner was entitled to recover from the respondent herein on an implied assumpsit, the moneys paid by him to said respondent in reliance upon said void contract and agreement.

V.

Summary of Argument.

A. The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty-five Thousand Dollars ($35,000), the Thirty-five Thousand Dollars ($35,000), First National Company collateral trust, Series "O," first mortgage real estate 5½% gold bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

(a) The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

(b) The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

B. The respondent, having received the benefits of the repurchase contract, is estopped to plead that such contract was ultra vires.

C. Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strength of said agreement.

VI.

Argument.

A. The agreement of the respondent to repurchase from the petitioner on demand at the maturity thereof at par or Thirty-five Thousand Dollars ($35,000), the Thirty-five Thousand Dollars ($35,000) First National Company collateral trust, Series "O," first mortgage real estate 5½% gold bonds is within the corporate powers and authority of the respondent under its charter and the National Bank Act.

(a) The National Bank Act, under which the respondent was organized, expressly authorized the respondent to buy and sell without recourse the bonds in question.

The National Bank Act of 1922, as amended by the Act of February 25, 1927, c. 191, sec. 2; 44 Stat. 1226, which was in force at the time when the respondent sold the First National Company bonds to the petitioner, provided as follows:

> "* * * The association shall become * * * a body corporate, * * * and it shall have the power—
>
> "*Third.* To make contracts. * * *
>
> "*Seventh.* To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; * * * Provided, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations, evidencing indebtedness of any person, co-

partnership, association or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities * * *."

Under the authority of this statute, the respondent Bank was empowered to buy and sell without recourse the bonds in question and enter into contracts. The respondent had statutory power for every element involved in the instant transaction.

(b) The sale of the bonds by the respondent to the petitioner, coupled with the repurchase agreement, was a sale without recourse within the meaning of the National Bank Act.

The words "without recourse" have a definite legal significance when applied to bonds, notes or debentures which the National Banking Act permitted the respondent to buy and sell. They mean: Without liability on the obligation of the third party upon his failure to perform.

It was said in *Thompson* v. *First State Bank*, 102 Ga. 696:

> "The words 'sans recourse' ('without recourse'), * * * have no exact legal significance, except when they are employed by an endorser to limit his liability upon a negotiable instrument * * *. An instrument followed by this phrase relieves the endorser of liability *for the payment of such paper in the event it is dishonored by the maker or acceptor.*" (Italics our own.)

To the same effect are the following cases: *Kaill* v. *Bell*, 88 Kas. 666; *Youngberg* v. *Nelson*, 51 Minn. 172; *Reynolds Mortgage Co.* v. *Garrett*, 23 S. W. (2d) 835 (Tex. Civ. App. 1929); *Cameron* v. *Ham*, 23 Ohio App. 359; *Arthur* v. *Rosier*, 217 Mo. App. 382.

With this definition before us, let us examine the written contract of November 1, 1929, to see if it obligates the respondent to pay the First National Company bonds if the maker thereof fails to do so. For the convenience of the Court we will set forth the contract, which reads as follows:

"Atlas Exchange National Bank
of Chicago
Capital and Surplus $240,000
Chicago, Ill.

Nov. 1, 1929.

Mr. Leo Awotin,
1920 S. Halsted St.
Chicago, Ill.

Dear Sir:

This is to acknowledge that we have this day sold you thirty-five thousand ($35,000) Dollars, par value First National Company, Collateral Trust, Series 'O' First Mortgage Real Estate 5½% Gold Bonds, in denominations of $1,000 each, numbered as follows: Nos. 4584-4585 and 4612 to 4644 inclusive.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000 and accrued interest.

Yours very truly,

B. M. Blankenheim,
Cashier."

There is not one word in the respondent's agreement which hints at a guaranty or which provides recourse

against the respondent. By this agreement, the respondent does not become liable for the payment of the bonds in the event that they are dishonored by the First National Company, the maker thereof. The respondent's obligation to repurchase the bonds is in no wise conditioned upon the failure of the First National Company to pay them at their maturity. From the plain and unambiguous language of the contract, the respondent's obligation thereunder is solely to *repurchase* the bonds upon the demand of the petitioner, independently of the performance or non-performance or default by the First National Company of its obligation to pay said bonds at their maturity. The essential element of the guaranty or of recourse is, therefore, lacking, and there is no justification for reading that element into the contract. In fact, it is impossible by the longest stretch of imagination to read into these simple words any promise by the respondent to pay the bonds upon default by the maker, the First National Company.

Viewed from another aspect, we respectfully submit to the Court that the respondent's agreement cannot be construed as affording recourse against it.

The respondent must be regarded as having been the owner of the bonds which it sold to the petitioner. They constituted a part of its assets. Selling property is an act of ownership, unless the contrary is shown. *Farmers and Merchants State Bank* v. *Mellum, et al.*, 173 Minn. 327, 212 N. W. 308. There is no such showing in the record of this case.

Being the owner of the bonds, the respondent sold them upon the condition that if the petitioner desired to do so, he could return them and receive back from the respondent the purchase price which it received and retained as part of its assets. In short, the sale was subject to defeasance

upon a condition subsequent, *i. e.*, the exercise by the petitioner of his right to resell said bonds to the respondent.

Wolf v. *National Bank of Illinois*, 178 Ill. 85.
Ubben v. *Binnian*, 182 Ill. 508.
Kantzeler v. *Bensinger*, 214 Ill. 589.
Stewart v. *Dobson*, 282 Ill. 192.
Freedman v. *Madison & Kedzie State Bank*, 258 Ill. App. 519 (*certiorari* denied, 259 Ill. App. XIV.)

Viewed thusly, it cannot be said that the agreement in question was a guaranty of the bonds or afforded recourse against the respondent. It merely permitted the petitioner to be placed in *statu quo*, if he so desired, by exercising his right to resell the bonds to the respondent, and if the parties should be thus restored to their former positions, the respondent would again become the owner of the bonds which it formerly owned and the petitioner would have his money back. As long as the respondent had the authority to buy the bonds in the first instance, it must have the authority to buy them from the petitioner. Especially must this be true, when the respondent's agreement was an inducement to the petitioner to pay Thirty Five Thousand Dollars ($35,000) for the bonds.

The Appellate Court of Illinois relied upon the recent decision of the Supreme Court of Illinois in the case of *Knass* v. *Madison & Kedzie State Bank*, 354 Ill. 554, when it held void the repurchase contract declared on in this case and also when it held that the transaction between the petitioner and the respondent was not a conditional sale. We respectfully submit to this Honorable Court that the *Knass* case is not an authority for the case at bar; it cannot be deemed analogous to the case before this Court, and that it did not overrule the cases last cited by us in support of

our contention that the repurchase contract made the transaction a conditional sale.

There are two important facts in the *Knass* case which we desire to point out to the Court: (1) The Illinois Court was there considering the powers of the banks organized under the Illinois Banking Act (Cahill's Ill. Rev. St., 1933, chap. 16a, sec. 1); (2) The bank, when it sold the bonds covered by a repurchase agreement, was acting not as a principal, but as a broker, as it appears from the language of the Illinois Supreme Court, when it said on pages 568 and 569: "The fact that the bank may have received a commission for selling them in no wise renders the mortgage bonds obligations of the Bank" and "it will be presumed that the mortgagor, * * * received the amount paid by the claimants (complainants in the case) less commissions charged for the sale."

The Illinois Banking Act (Cahill's Ill. Rev. St., 1933, chap. 16a, sec. 1) reads as follows:

> "It shall be lawful to form banks and banking associations, as hereinafter provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks or banking associations shall have the power to loan money on personal and real estate security and to accept and execute trusts, and shall be subject to all of the provisions of this Act."

Under this statute, the bank in the *Knass* case was not authorized to buy bonds nor was it authorized to act as an agent or broker in the purchase or sale of bonds. Clearly, then, the repurchase agreement in the *Knass* case was *ultra vires* under the Illinois Statute, *because the bank had no*

authority to enter into a contract for the purchase of bonds and not because such a contract might constitute a guaranty of the bonds. Even if the Court had not considered the contract as a guaranty, the bank did not have the power to buy the bonds.

The Supreme Court of Illinois chose to pass over the fact that the bank had no authority to buy bonds and decided the *Knass* case on the theory that the sale with the repurchase agreement constituted a guaranty of the bonds and not a conditional sale thereof.

Under the facts in the *Knass* case, the sale could not have been conditional so as to obligate the *bank* to repurchase the bonds because it was acting as a broker in the transaction. The sale was not for its own use and benefit. The bank did not retain the purchase price, but delivered it to the maker of the bonds less its broker's commission which amount it retained. If the sale were to be conditional, the maker of the bonds, who had received the purchase price therefor, would have had to take the bonds back and refund the money received. If the bank had been forced to perform the contract, it would have been making an original sale, and we have seen that under the Illinois Banking Act, it was not authorized so to do.

Clearly, under the facts in the *Knass* case, as we have outlined them, the Illinois Supreme Court did not overrule those cases which support our contention that the transaction involved in the case at bar was a conditional sale. In our case, the bank received the purchase price for its own use and benefit and had it performed the obligations of its contract and repurchased the bonds, it would have been returned to the same position in which it stood prior to the sale—owning the same bonds. In the *Knass* case, however, a performance of the contract by the bank would

not have resulted in returning the parties to a *status quo*, but, as we have seen, it would have forced the bank to buy bonds which, under the Illinois Banking Act, it had no authority to do.

In the case at bar, the petitioner's right to resell and the respondent's obligation to repurchase the bonds, were not conditioned upon any default in the payment thereof by the First National Company.

We respectfully submit that upon the authority of the cases which we have cited and upon a logical analysis of the facts of the case at bar, the transaction was a conditional sale and as such was not a sale without recourse.

The Supreme Court of Illinois in its decision in the *Knass* case discussed what it deemed to be dangers to which the financial structure of the bank and its depositors and the public at large would be subjected if the bank were permitted to enter into repurchase agreements creating contingent liabilities against which it would be powerless to protect itself. While those dangers may have existed under the facts of that case, that danger is, however, not present in the case at bar, because, as we have already pointed out to the Court, *when the contingent liability was created, the bank received for its own use and benefit assets sufficient to offset such liability and, therefore, the bank could have set up a reserve against the maturity of such liability.*

In the myriad of other authorized transactions in which a national bank engages, it incurs liabilities, many of which are contingent, and against which it protects itself. Merely because it incurs a liability, absolute or contingent, is no reason for denying to the bank power to engage in such transactions, so long as such a power is expressly granted by the statute.

We respectfully submit that the repurchase contract involved herein did not make the sale of the First National Company bonds to the petitioner a sale with recourse; that the sale was a conditional sale and as such it was within the expressly granted powers of the respondent.

B. The respondent, having received the benefits of the repurchase contract, is estopped to plead that such contract was ultra vires.

If we assume for the purpose of this argument that the contract in question made the sale of the First National Company Bonds to the petitioner a sale with recourse, and constituted a guaranty of the bonds, the respondent could not avail itself of the defense of *ultra vires.*

The statute gives to the respondent the authority to buy and sell investment securities without recourse. To sell them with recourse would be only *an abuse of granted power* and the respondent, having received the benefits of a contract made only in excess or in abuse of its *granted powers,* is estopped to plead the defense of *ultra vires.*

Gibson v. *Kansas City Refining Co.*, 32 F. (2d) 658.

Standard Furniture Co. v. *Smith*, 32 F. (2d) 176.

Grand Valley, etc. v. *Zummbrunn*, 272 Fed. 943.

This rule must be distinguished from that principle, laid down by this Court, to the effect that a corporation cannot be estopped from pleading the defense of *ultra vires* to an act which it had *no* authority under its charter to do. In this case the respondent had the authority and power to sell the bonds so that at the most it *abused* that *granted* power by selling the bonds with recourse.

C. Even if the repurchase agreement is ultra vires and void, the petitioner is entitled to recover from the respondent, in general assumpsit, the amount of money he paid to said respondent for the purchase of the bonds in question on the strength of said agreement.

We have already pointed out to the Court that the respondent must be regarded as having been the owner of the bonds which it sold, they had been a part of the bank's assets, so that when it received Thirty Five Thousand Dollars ($35,000) from the petitioner, the purchase price thereof, that money was received for its own use and was retained by it and took the place of the bonds among the bank's assets. The respondent received the benefit from the contract.

The respondent, after receiving the benefit of its alleged *ultra vires* contract, repudiated it when called upon to perform. The respondent made no offer to return the benefits thus received, and it is a well-settled rule of law often decided by this Court, that a corporation which has repudiated a contract as being *ultra vires*, will not be permitted to retain the benefits it has received under such a void agreement, and is liable therefor upon an implied assumpsit.

Central Transportation Co. v. *Pullman, etc. Co.*, 139 U. S. 24, 60.

Logan County National Bank v. *Townsend*, 139 U. S. 67.

Pullman Car Company v. *Central Transportation Co.*, 171 U. S. 138, 151.

Aldrich v. *Chemical National Bank*, 176 U. S. 618.

Citizens' Central National Bank v. *Appleton*, 216 U. S. 196.

The case of *Citizens' Central National Bank* v. *Appleton, supra,* 216 U. S. 196, is one wherein a National Bank, to which one Samuels was indebted in the sum of Ten Thousand Dollars ($10,000), induced another bank to lend Twelve Thousand Dollars ($12,000) to Samuels and guaranteed the re-payment of the loan. Samuels had prior thereto agreed to pay the National Bank Ten Thousand Dollars ($10,000) out of the Twelve Thousand Dollars ($12,000) loan. When sued on the guaranty, the National Bank defended on the ground that a guaranty was beyond its powers and in violation of the National Banking laws. Of this defense, the Court said, on page 202:

> "But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank * * *. The law would be more impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. * * * In short, the Central National Bank, by means of the device mentioned, got Ten Thousand Dollars ($10,000) * * * for its own benefit, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

The Court then reviewed and discussed with approval the cases last cited by us in support of this point. For that reason, the *Appleton* case, *supra,* 216 U. S. 196, is important.

This doctrine is distinguishable from the general rule announced by this Court that a corporation may not be estopped to plead the defense of *ultra vires* and that no rights arise out of an *ultra vires* contract (*Texas and Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245); it is predicated upon the theory that the corporation, having received money or property under a void agreement, is not, in equity and good conscience, entitled to retain the money or property and at the same time repudiate the contract.

The Appellate Court of Illinois in its decision of the case at bar held that the petitioner had no right to recover upon an implied assumpsit, the moneys paid for the purchase of the bonds on the strength of the repurchase agreement; the court based its decision on two grounds: First, that under this Court's decision in the case of *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, no rights arise out of an *ultra vires* contract, so no recovery could be had, and second, because the affidavit of claim filed by the petitioner in support of his declaration disclosed that the cause of action was predicated upon the written contract which, the Appellate Court held, was void.

In attempting to recover upon the implied assumpsit we do not seek to recover on the contract and there is nothing in the facts or in what this Court said in the *Pottorff* case, that is in conflict, either directly or indirectly, with the cases cited by us in support of our right to recover upon the implied assumpsit theory. In that case, this Court merely said that a National Bank could not be estopped from defending an action on a contract on the ground that it was *ultra vires*, and that *even if the doctrine of the recovery of the benefits obtained by means of an ultra vires contract were applicable* (to the facts in the *Pottorff* case), the complainant therein would not be en-

titled to recover the full amount of its depost in the defunct bank, because,

> "*the argument if applicable would not help the Railway.* Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded." (Italics our own.)

We respectfully submit that the *Pottorff* case in no wise overrules the cases last cited by us in support of this branch of our argument. This Court still recognizes the salutary doctrine of the right to recover, upon an implied promise, any benefits received by virtue of an *ultra vires* contract.

The second proposition upon which the Appellate Court grounded its denial of any recovery upon the implied assumpsit theory is, we believe, equally without force.

As we have already stated to the Court, the petitioner declared against the respondent in special assumpsit and also in general assumpsit, filing a special and the common counts. The affidavit of claim which the petitioner filed pursuant to the Illinois Practice Act of 1907 (Cahill's Ill. Rev. St., 1931, par. 55) (See Appendix) stated that his demand was upon the written contract.

It is an elementary rule of pleading that allegations in the *declaration* control the right of recovery. It is likewise elementary that each count is a declaration in and of itself, and that even though two or more counts may be

joined in a single action, each count remains a declaration. It is important to note that the purpose of a joinder of counts in special and general assumpsit is to permit a plaintiff to recover any money to which he may be entitled under the evidence if it develops that for some reason he cannot recover on the express contract. In short, when the common counts are joined to a special count, they act as a catchall in order to permit a recovery if the plaintiff proves any cause of action in assumpsit. 5 Corpus Juris 1399.

It is true that in the case before the Court, the affidavit of claim states that the petitioner's demand is upon a written contract, but this affidavit applied only to the petitioner's demand under the special count. In other words, the affidavit was filed to the special count alone, and there was no affidavit filed to the common counts. To hold otherwise, would be to render nugatory the very purpose of joining common and special counts. It would permit pleadings to be controlled by affidavits to an extent not contemplated by the statute (Cahill's Ill. Rev. St., 1931, chap. 110, sec. 55) (See Appendix) when we consider that its purpose is to aid plaintiffs and relieve them from the delay occasioned by defendant's pleading sham defenses. *Harrison* v. *Rosehill Cemetery Company*, 291 Ill. 416, at 419, 420; *Haggard* v. *Smith*, 71 Ill. 226; *Cooper* v. *Anderson*, 236 Ill. App. 1, 5; *Reddig* v. *Looney*, 208 Ill. App. 413, 416.

The purpose of the statute being as we have stated, the affidavit of plaintiff's claim is construed as being evidenciary in character, that is, it supplies the evidence upon which the Court may enter a judgment if a defendant fails to appear or to plead, or if he pleads, then if he fails to file an affidavit of meritorious defense. *Keator, etc. Co.* v. *Thompson*, 144 U. S. 436; *Kern* v. *Strasberger*, 71 Ill. 303, 305; *Silliman* v. *Nowlan*, 271 Ill. App. 484, 493.

When this case was before the Appellate Court on the first appeal (*Awotin* v. *Atlas Exchange National Bank of Chicago*, 265 Ill. App. 238), the respondent argued that since the petitioner's affidavit of claim alleged that his demand was upon the written contract, he could have no recovery upon the implied assumpsit. To this argument, the Appellate Court said, on page 248 of its opinion:

> "But defendant's counsel contends that there can be no recovery by plaintiff in this case. Under an *implied* promise or agreement, '*where the verified statement of claim* alleges an *express* promise.' Counsel refers to that portion of plaintiff's 'affidavit of amount due,' as above set forth, wherein plaintiff states that his demand is 'for $37,085.41 • • • *under its written agreement, dated Nov. 1, 1929,*' etc. In support of his contention counsel cites certain Appellate Court decisions. But we think that plaintiff's declaration, in which are included the common counts, is sufficient to warrant a recovery under an implied promise • • •. If counsel's contention be a good one, in those cases where an affidavit of claim has been filed by a plaintiff with his declaration and an affidavit of merits by a defendant with his plea, the result would be that such cases would be tried, as said in *Cox* v. *Aetna Cas. & Surety Co.*, 261 Ill. App. 394, 399, 'upon the issues made by the affidavits instead of by the pleadings.' In our opinion there is no merit in counsel's contention."

When the Appellate Court had the case before it on the second appeal, it completely reversed its stand on this proposition, saying:

> "Plaintiff's counsel also contends that 'even if it be considered that the bank in making the repurchase agreement acted *ultra vires*, plaintiff, having tendered

the bonds, is entitled to recover back what he paid therefor, plus accrued interest, on an implied *assumpsit.*' It is our opinion that this contention is also without merit. Plaintiff's affidavit of claim accompanying his declaration does not disclose that he is seeking a recovery on the theory of an implied *assumpsit* after having tendered back the bonds, but rather by virtue of said repurchase agreement of November 1, 1929. Furthermore, as stated in the opinion in the *Pottorff* case, *supra,* it is the settled doctrine of the Supreme Court of the United States that 'no rights arise on an *ultra vires* contract even though the contract has been performed.' This is also the settled law of this State as appears from the opinion in the *Knass* case, *supra,* (pp. 569-70). And we think that under said decisions and holdings plaintiff's counsel's further contention, that defendant cannot avoid the contract on the ground that it is *ultra vires* 'without tendering to plaintiff the money defendant received from plaintiff' is equally without merit.''

It seems quite apparent that if the Appellate Court had believed that the substantive law permitted the petitioner to recover on the implied assumpsit, it would not have reversed its former ruling on the procedural question. The Court, however, relying upon the case of *Texas & Pacific Railway Co.* v. *Pottorff, supra,* 291 U. S. 245, held that as a matter of substantive law the petitioner could not recover upon the implied promise and, consequently, its ruling on the procedural question was merely gratuitous. We have heretofore pointed out to this Court that nothing in its opinion in the *Pottorff* case could be deemed to prevent a recovery upon the implied contract theory.

The cases in which the Illinois Courts have said that the affidavit of claim and the affidavit of merits limits the issues indicate that the language means that the parties

are limited to introducing evidence only on the facts alleged in their respective affidavits. *Keim* v. *Thum*, 238 Ill. App. 579; *Goddard Tool Co.* v. *Crown, etc., Co.*, 219 Ill. App. 34; *Cooper* v. *Anderson*, 264 Ill. App. 1; *Reddig* v. *Looney*, 208 Ill. App. 413.

We respectfully submit that the petitioner is entitled to recover in general assumpsit the moneys which he paid for the First National Company bonds in reliance upon the contract which the respondent has repudiated on the ground that it is *ultra vires.*

CONCLUSION.

We respectfully submit to this Honorable Court that the repurchase contract declared on in this case is not *ultra vires;* that it is within the express powers of the respondent as granted by the National Bank Act; that at the most the repurchase agreement can be deemed only to be an abuse of the express powers of the respondent who is estopped to plead the defense by reason of the fact that it has received and retains the benefits of the transaction; and, finally, we respectfully submit that we have shown to the Court that even assuming the repurchase agreement to be *ultra vires,* the petitioner is entitled to recover from the respondent in general assumpsit the purchase price of the bonds paid by him in reliance upon the alleged repurchase contract. We, therefore, pray that this Honorable Court reverse the judgment of the Appellate Court of Illinois, First District.

Respectfully submitted,

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APPENDIX.

Illinois Civil Practice Act, sub-section (2) of Section 75, Article VIII (Cahill's Ill. Rev. St., 1933, Chap. 110, Par. 203):

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however*, that in actions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen

hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

Illinois Practice Act of 1907, section 55 (Cahill's Illinois Revised Statutes, 1931, Chap. 110, Sec. 55):

"Affidavit of plaintiff's claim—Default—Defendant's affidavit of merits.) Sec. 55. If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an

affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, and if a portion specifying the amount (according to the best of his judgment and belief), upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order; no affidavit of merits need be filed with a demurrer or motion: *Provided,* that this section shall not apply to any case where an executor or administrator shall defend in behalf of any estate: *And, provided, further,* that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits, and that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court but expects to produce by the next term, the court shall continue such cause until the next term. If the affidavit of defense is to only a portion of the plaintiff's demand the plaintiff shall be entitled to a judgment for the balance of his demand, and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor; but in such case the court may make such order as to the costs of the suit as may be equitable."

FILE COPY

No. 661

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CHARLES ELMORE CROPL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

LEO AWOTIN,

Petitioner,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

I.

JURISDICTION OF THIS COURT.

A.

For this Court to assume jurisdiction it must affirmatively appear from the record that the Federal question was presented to and necessarily decided by the Supreme Court of Illinois.

Petitioner has not seen fit to include in the record presented to this Court any of the pleading and proceeding

before the Supreme Court of Illinois other than the copy of the order denying him leave to appeal. It is conceivable that his petition for leave to appeal may have raised only questions of State law and procedure which did not involve a federal question and that the Court's refusal to entertain the appeal was not a refusal to consider and determine such federal question.

This Court in the recent case of *Lynch* v. *New York ex rel. Pierson*, 79 Law Ed. Adv. Op. 1, says at page 2:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

B.

The exercise of the discretion of the State Supreme Court as to whether it should review the judgment of the Appellate Court was never properly invoked by petitioner.

There appears in the record no showing that any proper application was made to the Supreme Court of Illinois, the highest court of the State, to review the decision of the Appellate Court, which it is here sought to review.

Petitioner in making his application to the Supreme Court of Illinois admittedly followed the procedure provided by the Civil Practice Act of that State. This Civil Practice Act enacted in Illinois June 23, 1933, and in force January 1, 1934 (Cahill's Illinois Revised Statutes 1933, Chapter 110), did not apply to judgments rendered by the trial court prior to January 1, 1934. The judgment in ques-

tion was entered by the Circuit Court of Cook County, Illinois, April 15, 1932.

By Section 1 of Article 1 of said Civil Practice Act it is provided that the Supreme Court of the State shall have power to make rules of pleading, practice and procedure for the city, County, Circuit, Superior, Appellate and Supreme Courts supplementary to but not inconsistent with the Act. By Section 3 of said Article 1 it is provided that the Schedule of Rules set forth in Article IX of the Act shall be subject to suspension and amendment by the Supreme Court. On December 22, 1933, the Supreme Court, pursuant to the provisions of the Civil Practice Act, adopted Rules of Practice and Procedure which appear in Volume 355 of the Illinois Supreme Court Reports, and the first rule thereof deals with the applicability of the Civil Practice Act. This Rule No. 1 is as follows:

"APPLICABILITY OF CIVIL PRACTICE ACT.

Rule 1. All provisions of the Civil Practice Act with respect to review in civil proceedings by the Supreme or Appellate Courts shall apply to orders, determinations, decisions, judgments or decrees entered by trial courts on or after January 1, 1934. All suits in which a summons has been issued prior to January 1, 1934, but in which no pleadings have been filed by either party prior thereto, shall be governed by the Civil Practice Act. The provisions of the Civil Practice Act with respect to service of process issued on or after January 1, 1934 (sections 6, 10, 13-19), appearance (section 20) and trial practice (sections 48-73) shall apply to proceedings instituted prior to January 1, 1934, and not on trial prior to that day. Except as provided by this rule, or by written stipulation of parties, or by order of the court, upon notice and motion, proceedings instituted prior to January 1, 1934, shall not be governed by the Civil Practice Act."

Rule No. 71 provides that:

"These rules shall be in effect January 1, 1934, and